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ORIGINAL

EX PARTE OR LATE FILED

Gina Harrison
Senior Counsel and Director
Washington Office

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OCT 26 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 26, 1999

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Meeting,
Jurisdictional Separations Reform, CC Docket
No. 80-286/Local Number Portability Cost
Recovery, CC Docket No. 95-116

Dear Ms. Salas:

Yesterday, Robert T. Anderson, President, Kenneth A. Levy, Vice President & General Counsel, and I, -- all of NECA -- met with Linda Kinney, Legal Advisor to Commissioner Ness, to discuss matters reflected in the attached and in NECA's pleadings in CC Docket No. 95-116. A copy of the instant enclosure was given to Ms. Kinney.

In accordance with Commission Rules, I am submitting two copies of this notice. Kindly stamp the additional return copy provided. Please direct any questions regarding this filing to me.

Sincerely,

Gina Harrison
Attachments
Cc: L. Kinney

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List ABCDE

NECA NATIONAL EXCHANGE
CARRIER ASSOCIATION

100 South Jefferson Road
Whippany, NJ 07981

Richard A. Askoff
Deputy General Counsel

October 5, 1999

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OCT 05 1999

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Voice: 973-884-8350
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Mr. Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Strickling:

New information has come to light which adds urgency to the recent request of the state members of the Joint Board on Separations for an en banc meeting to deal with Internet related issues. Since filing a letter in support of the state member's request, NECA has completed a comprehensive survey of rural local telephone companies to determine the extent of Internet traffic. The results detailed below make a compelling case for an interim separations freeze as soon as possible. NECA asks the Commission to adopt an interim separations freeze quickly based on the record before the Commission.

NECA projects, based on results of a recent data request to its member companies, that approximately 18% of 1998 local/intrastate dial equipment minutes represent Internet traffic. Treating this jurisdictionally interstate traffic as intrastate for separations purposes produces a \$170 million misallocation of costs to the state jurisdiction for NECA pool members. Local ratepayers are unlikely to accept rate increases to recover these costs which are related to interstate traffic.

Further, the tremendous growth of Internet traffic can create network congestion that impairs service levels to subscribers absent significant investments in network facilities. Rural local exchange carriers, however, are caught in regulatory uncertainty surrounding the cost recovery for Internet traffic. Continuation of the status quo places carriers in the untenable position of having to make investments with unknown cost recovery.

Pending ultimate resolution of the difficult rate and cost recovery issues surrounding Internet traffic, it is essential that the proposed en banc meeting be convened quickly and an interim separations freeze, based on a representative historical period, be put into effect immediately.

Very truly yours,

Richard A. Askoff
2012

The Honorable William Kennard, Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8B-201
Washington, D.C. 20554

The Honorable Susan Ness, Commissioner
Federal Communications Commission
445 12th Street
Washington, D.C. 20554

The Honorable Michael Powell,
Commissioner
Federal Communications Commission
445 12th Street, S.W.
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The Honorable David W. Rolka,
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Pennsylvania Public Utility Commission
North and Commonwealth Streets
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Harrisburg, PA 17105-3265

The Honorable Joan H. Smith,
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The Honorable Thomas L. Welch, Chairperson
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STATE MEMBERS
THE FEDERAL-STATE JOINT BOARD ON SEPARATIONS EX PARTE OR LATE FILED
P.O. BOX 684
WASHINGTON, D.C. 20044-0684

June 17, 1999

Chairman Kennard
Chair, Federal State Joint Board On Separations
Commissioner Ness
Federal State Board on Separations
Commissioner Powell
Member, Federal State Joint Board on Separations
445 12th St., S.W.
Washington, D.C. 20554

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JUN 17 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: EX PARTE – TWO ORIGINALS FILED IN THE PROCEEDING CAPTIONED:

*In the Matter of Jurisdictional Separations Reform and Referral to the
Federal-State Joint Board - CC Docket No. 80-286*

Request for an En Banc Meeting of the Full Separations Joint Board.

Dear Colleagues

We are writing to each of you because several recent developments have major implications for the separations process. These developments, as well as some provisions of the Telecommunications Act of 1996, raise issues of fundamental importance to the separations process and to the historic balance of responsibilities between Federal and State regulators. These issues require expedited resolution to ensure the reasonableness of the jurisdictional allocation process.

Because of the importance of the issues now before us, we think there is a need for more direct collaboration and regular working contact between State and Federal members of the Joint Board. Of immediate concern are recent developments relating to the Internet. The Commission has issued two separate decisions on this topic that relied upon and significantly extended the logic and effect of the Bell South Memory Call case,¹ a case that has been largely dormant from a separations perspective. First, the GTE DSL tariff decision raised questions about allocating the costs of intrastate facilities used to provide interstate DSL services. The more recent decision involved reciprocal compensation and other matters. It mandated a new principle that some jurisdictionally interstate services may be provided and sold under intrastate tariffs.

¹ *In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619-21 (1992)

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List A B C D E

This is a fundamental change to traditional federal-state authority, and it has many implications concerning responsibility over cost recovery and rate design. In addition, we have substantive concerns associated with the recent letter to SBC. Aside from the substantive aspects of the letter, we also are concerned about the letter's applicability to other carriers and the method by which it was issued.

Other Internet-related developments that should be discussed include anecdotal evidence of increases in local usage minutes, the effect of that increase on separations factors, and the ensuing cost shift to the intrastate jurisdiction. Recent network congestion problems in some areas also have made us aware that some network facilities considered to be non-traffic-sensitive (NTS) may be actually traffic sensitive (TS). This suggests that some equipment currently categorized as NTS should be reclassified as TS and be allocated based on usage.

Direct collaboration is also needed on the fundamental separations and jurisdictional issues we raised last winter in our report. We identified numerous problems, including that (a) technology has made traditional allocations more arbitrary, (b) usage is now more difficult to track, (c) end user charges have undermined the rate design underpinnings of separations, and (d) separations aspects of §254(k) of the Telecommunications Act still have to be addressed by this Board. The report concluded that the focus of further Joint Board activity should be to explore how best to achieve the overall goals of separations with a new, more rational, structure.

Several issues are ripe for decision by this Joint Board now that the comment cycle on our report (as well as on issues raised and tentative conclusions proposed by the Commission in its separations NPRM) has concluded. We think it would be useful to seek a Joint Board consensus on a work plan to address the issues listed below. We recognize that the federal commissioners may have other issues they would like added to the list. But, in any event, we believe that it is now time to begin our work on numerous issues including:

- the appropriate separations treatment of facilities used to provide UNEs in the wake of the Supreme Court decision;
- the separations changes required in light of the Commission's decision that it has jurisdiction over Internet communications and other Internet-related developments;
- the implementation of a three-year rolling averaging of separations usage factors or a freeze of factors;
- whether changes are needed as to the manner in which separations interpretations are issued;
- whether a new, more rational, structure should be designed, possibly including a realignment of jurisdictional responsibility;

- whether increasing competition for some of the lines of business of local exchange carriers:
 - requires updating of the existing relationships among Part 64, Part 36 and State decisions about competitive "below the line" services; and
 - allows significant simplification of existing accounting and separations structures;
- whether the second sentence of section 254(k) of the Act imposes new duties on the Commission and the States, and if so, whether any fundamental change is needed to existing accounting and separations requirements; and finally
- whether potential "takings" or "confiscation" liabilities at either the State or federal level impose constraints on the appropriate level of separations requirements.

This list of issues does not include numerous other items that have been referred to this Joint Board.

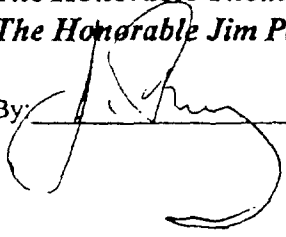
With all of these issues presently pending, it is essential that the State and federal members of the Joint Board maintain frequent, clear and meaningful communications. *With this purpose in mind, we request a public en banc meeting be scheduled for the fall, perhaps September.* We envision this meeting to be primarily a working meeting to put our efforts on track - with all commissioners, State and federal, freely expressing their views on the fundamental questions. We expect to prioritize the issues and develop a work plan that will address the issues in a feasible time frame. We also envision significant advance staff work, and we would hope that some action items on short-term issues can be prepared and decided as well.

We look forward to receiving information about your availability for a meeting. Please have your staff contact Sam Loudenslager, our staff chair, at the Arkansas Public Service Commission, 1000 Center Building, Little Rock, Arkansas 72201, for scheduling.

Sincerely,

State Members, Federal State Joint Board on Separations

The Honorable David Rolka, COMMISSIONER PENNSYLVANIA PUBLIC UTILITY COMMISSION
The Honorable Joan Smith, COMMISSIONER, OREGON PUBLIC UTILITY COMMISSION
The Honorable Thomas Welch, CHAIRMAN, MAINE PUBLIC UTILITIES COMMISSION
The Honorable Jim Posey, COMMISSIONER, ALASKA PUBLIC UTILITIES COMMISSION

By:  Acting Counsel For State Members.

Richard A. Askoff
Deputy General Counsel

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July 13, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325
Washington, D. C. 20554

Re: Jurisdictional Separations Reform and Referral to the Federal-State Joint Board -- CC Docket No. 80-286

Request for an En Banc Meeting of the Full Separations Joint Board

Dear Ms. Salas,

On June 17, 1999, the State Members of the Federal-State Joint Board on Separations wrote to Chairman Kennard and Commissioners Ness and Powell, requesting an *en banc* meeting of the full Separations Joint Board in CC Docket 80-286.¹

The State Member's letter highlights several recent developments affecting jurisdictional separations -- most notably, two recent Commission orders on the jurisdictional nature of Internet traffic, and a recent letter from the Common Carrier Bureau to Southwestern Bell regarding treatment of Internet traffic in separations studies.² The State Members point out that increasing levels of Internet traffic, changes in network technologies, and numerous other factors, are raising fundamental separations and jurisdictional issues. The State Members accordingly propose an *en banc* meeting of the full Joint Board, to be held as soon as September of this year, to address the effects of these issues on the jurisdictional separations rules.

NECA agrees that immediate action is needed to resolve separations issues associated with Internet traffic. This issue is becoming critical for local exchange carriers, especially the small rural carriers that are most affected by distortions in separations factors caused by Internet traffic. While the Commission certainly should respond positively to the State Members' request for an *en banc* meeting, interim relief should not await the results of a Joint Board meeting in the Fall. Rather, the Commission should take interim action *now* to maintain reasonable jurisdiction cost allocation results, pending the outcome of this proceeding.

¹ See Letter from State Members, The Federal-State Joint Board on Separations, to William Kennard, Chairman of the Federal Communications Commission (FCC), Susan Ness, FCC Commissioner, and Michael Powell, FCC Commissioner at 1 (June 17, 1999) (on file with the FCC).

² *Id.*, referencing GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, *Memorandum Opinion and Order*, 13 FCC Red 22466 (1998); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 64 F.R. 14239 (1999); and Letter from Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC to Dale Robertson, SBC Communications (May 18, 1999).

Throughout the course of this proceeding NECA and other commenters have urged the Commission to update the separations rules to reflect changes in network usage and new technology.³ Internet traffic, in particular, is causing significant distortions in separations results for small rate of return carriers. Contrary to the Common Carrier Bureau's recent letter to Southwestern Bell, the Commission's rules provide no basis for treating interstate traffic as anything other than interstate for jurisdictional separations purposes.

Requiring rate of return carriers instead to treat this traffic as intrastate in their separations studies improperly shifts significant amounts of interstate costs to the state jurisdiction. Carriers seeking to recover these costs may need to file a state rate case to consider the increased allocations. Since the Commission has declared the relevant traffic to be interstate, however, local ratepayers may strongly object to any attempt to recover these shifted costs via local rate increases. In the end, carriers may well be prevented from recovering these interstate revenue requirements in either jurisdiction. Faced with the prospect of unrecoverable costs, carriers ultimately may be prevented from investing in network upgrades needed to handle increasing traffic loads associated with dial-up Internet traffic.

NECA and other industry representatives repeatedly have called for rapid interim relief to "freeze" separations factors, so as to preserve the *status quo* pending Commission action on separations reform. Similarly, NECA and other parties have suggested that Internet traffic could be eliminated from traffic factor development.⁴ Prompt Commission action on these interim proposals could help mitigate the separations distortions cited by the State Members of the Joint Board. In any event, as the State Members appear to recognize, interim action is needed now, even before an *en banc* meeting is convened. Further, if an *en banc* hearing is held, NECA would like to participate to describe the adverse effects upon rural companies resulting from the current treatment.

Very truly yours,

Richard A. Askoff

³ See, e.g., The Rural Telephone Coalition Comments on Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22120 (1997)(*NPRM*) (Dec. 10, 1997); United States Telephone Association Comments on *NPRM* (Dec. 10, 1997); Dobson Telephone Company and McCloud Telephone Company Comments on *NPRM* (Dec. 10, 1997); and NECA Reply to *NPRM* (Jan. 26, 1998).

⁴ See, e.g., NECA Petition for Waiver of Section 36.2(a)(3) of the Commission's Rules (fil. May 8, 1998). See also Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, CC Docket No. 80-286, *State Members Report on Comprehensive Review of Separations* (fil. Dec. 21, 1998)(proposing a three-year rolling average of separations factors as an interim solution to anomalies affecting separations results.)



PUBLIC NOTICE

Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20554

News media information 202 / 418-0500
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Internet: <http://www.fcc.gov>
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Released: February 26, 1999
DA 99-414

REPORT FILED BY STATE MEMBERS OF JOINT BOARD ON JURISDICTIONAL SEPARATIONS

CC DOCKET NO. 80-286

In the Notice of Proposed Rulemaking issued in this proceeding, the Commission invited the state members of the Joint Board to develop a report identifying issues and subjects to address in a Further Notice.¹ On December 21, 1998, the state members of the Joint Board on jurisdictional separations filed a State Report with the Commission setting forth additional issues that should be addressed by the Joint Board in connection with its consideration of comprehensive separations reform, including a proposal for an interim approach to separations reform pending adoption of comprehensive reform.² The State Report indicates that the state members of the Joint Board are developing questions to complement the issues raised in the Report and requests that the Commission simultaneously seek comment on the State Report and the questions. The state members have not yet submitted the questions to the Commission. The state members, however, have requested that the Commission seek comment on the State Report without waiting for the questions to be filed. Following is a brief summary of the principal issues addressed in the State Report.

Confiscation liability. The state members maintain that some form of jurisdictional separations will be required as long as a potential confiscation liability remains. The state members do not believe that it is clear that competition alone would eliminate such claims.

Effects of new technologies on the separations process. The state members find that several technological changes, such as the shift from circuit to packet switches, may require changes in how traffic sensitive and non-traffic sensitive joint and common costs are measured and allocated.

Difficulties in tracking usage. The state members claim that it has become increasingly

¹ *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, CC Docket No. 80-286, 12 FCC Red 22120, 22132 (1997), para. 21.

² The State Report is available for public inspection in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C., 20554, from 9:00 a.m. to 4:30 p.m. An electronic copy of the Report also may be found on the Commission's Web Page at www.fcc.gov/ceb/.

difficult to track jurisdictional usage, most notably in connection with the Internet, where, for example, traditional usage measurements overlook the packet-switched part of the communication chain.

Effects of end-user charges. The state members claim that since 1986, when the Commission required some costs assigned to the interstate jurisdiction to be recovered from end-users through the subscriber line charge, there has been no direct relationship between the level of costs assigned to either jurisdiction and the level of basic monthly charges paid by customers.

Section 254(k). The state members believe that section 254 of the 1996 Act, which provides that "services included in the definition of universal service bear no more than a reasonable share of joint and common costs of facilities used to provide those services," may require accounting and separations rule changes.

Competitive services. The state members indicate that any reform of jurisdictional separations must take into account how costs are allocated between the jurisdictions when certain services are deregulated. In this regard, the state members claim that such reform may require an integration of Parts 36 and 64.

Modified structure. The state members recommend that the separations Joint Board consider proposals that fundamentally alter the basis upon which costs are allocated between the jurisdictions, e.g., GTE and US WEST proposal that proposes assigning significantly more costs and revenues to the state jurisdiction.

Transitional reform. The state members recommend that, until comprehensive separations reform can be adopted, the Joint Board should adopt on an interim basis a three-year rolling average, which would reduce the impact of usage changes and resulting cost shifts from year to year.

Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before **March 30, 1999**, and reply comments on or before **April 14, 1999**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address.>" A sample form and directions will be

sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

For further information, contact: Sharon Webber, Federal Communications Commission, Accounting Policy Division, 2100 M Street, N.W., 8th Floor, Washington, D.C. 20554; 202/418-7400.

-FCC-

used, what costs shifts might occur? How might they be mitigated? How might such a realignment impact the current and proposed high cost fund? What new regulatory mechanisms might be needed to implement realignment? How can a new separations structure complement, rather than frustrate, the universal service objectives of the Telecommunications Act of 1996, with particular attention to high cost states?

Finally, the exact nature of how the allocation would occur, how costs are recovered, and whether the FCC would preempt the states or otherwise impose requirements on the recovery of access costs could significantly impact local and interexchange rates.

VI. TRANSITIONAL REFORM OF SEPARATIONS

The state members recognize that moving immediately to a replacement for the current form of separations is impossible. For that reason, we recommend that the Joint Board consider, as an interim measure, an approach to Part 36 that minimizes the anomalies while still providing state and federal regulators with the vital "confiscation liability" information they require.

Various freeze proposals have been submitted which range from the use of a single frozen factor to freezing current factors based on a three year average (1993-95). There were a number of criticisms of these freeze proposals. We recommend that the Joint Board consider an alternative proposal which not only responds to the criticisms of the freeze proposals but also addresses the concerns which gave rise to the freeze concept. The alternative proposal averages the latest three years of separations usage factors on an ongoing basis, thereby dampening the impact of usage changes and resultant cost shifts from year to year.

The three-year rolling average proposal would be an interim solution, not the final goal of comprehensive separations reform. This proposal would include a three to five year time limit for

adoption of comprehensive reform. The separations process would be monitored during that period to determine the appropriateness of continuing the proposal or moving to a replacement. This interim proposal would eliminate large fluctuations in jurisdictional allocations while other changes resulting from the 1996 Act, technology and the move toward a more competitive environment continue. This three year rolling average proposal should:

- Address concerns regarding new technology and service offerings by assuring that revenues and costs are assigned to the jurisdiction with tariff approval authority.
- Apply to all non-average schedule ILECs, thereby rejecting the idea of bifurcated procedures for large and small ILECs.
- Base all non-average schedule ILEC jurisdictional allocation factors on the most recent three-year rolling band average of usage factors.
- Apply any separations changes which have been adopted at the time of the implementation of the rolling band procedure as an adjustment to all of the three years where applicable. For example, the Other Billing and Collection change which was adopted on February 7, 1997, would be applied retroactively to the three-year period. This would also apply to any "clean up" items which may surface during the comment process.

The rolling average proposal would balance the benefits of both a freeze and the current procedures while providing a continuity of process and maintaining essential data for monitoring purposes. In addition to providing stability, this proposal would capture traditionally measured impacts of new technologies on the network by retaining a connection to network usage. Finally, it would maintain a consistent relationship between revenues and costs and should not result in a re-negotiation of jurisdictional cost shifts during the interim period.

For these reasons, the Joint Board should consider this alternative proposal as an interim step to comprehensive separations reform.

VII. CONCLUSION

The state members submit this report as requested by the FCC in its NPRM issued in October 1997. We have not addressed in detail our position on each issue in the NPRM. Instead, we have taken this opportunity to highlight some broad items related to the long term approach to comprehensive review and to issues not included in the NPRM. We are developing questions to complement the items identified in the report and the NOPR, which should be issued in conjunction with the notice of this report. We also suggest an alternative interim approach to be fully developed with our federal counterparts until a comprehensive approach can be achieved in an expedited fashion.

To this end, we request that the FCC promptly issue a notice and establish a comment and reply cycle on this state report. Furthermore, we believe that a meeting should be scheduled

promptly to explore issues to be addressed in a Recommended Decision of the Joint Board to be issued during the spring of 1999. We believe that further meetings of the Joint Board should be held to develop a Further Notice of Proposed Rulemaking, finalize other Recommended Decisions and deal with issues related to Part 36 as they arise.

DAVID W. ROLKA
Pennsylvania Public Utility Commission

JOAN H. SMITH
Oregon Public Utility Commission

THOMAS L. WELCH
Maine Public Utilities Commission

JIM POSEY
Alaska Public Utilities Commission

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)	
)	CC Docket No. 80-286
Jurisdictional Separations Reform)	
And Referral to the Federal-State)	DA 99-414
Joint Board)	

COMMENTS

The National Exchange Carrier Association, Inc. (NECA), National Rural Telecom Association (NRTA), National Telephone Cooperative Association (NTCA), and Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), (collectively referred to as "Telephone Associations") submit their comments in response to the Federal Communications Commission's (FCC or Commission) *Public Notice*¹ regarding a December 21, 1998 *Report* by the State Members of the Federal State Joint Board (Joint Board) on Separations.² The *Public Notice* invites comment on a number of issues, including the *Report*'s recommendation that a three-year rolling average of separations usage factors be adopted on an interim basis until comprehensive separations reform can be adopted.

The Telephone Associations agree with the State Members that an interim measure is necessary while the Joint Board and the Commission complete their review of the jurisdictional separations procedures.³ As the State Members recognize, the current

¹ *Report Filed by State Members of Joint Board on Jurisdictional Separations*, CC Docket No. 80-286, *Public Notice*, DA 99-414 (rel. Feb. 26, 1999) (*Public Notice*).

² *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, *State Members' Report on Comprehensive Review of Separations* (fil. Dec. 21, 1998) (*Report*).

³ *Id.* at 15.

separations process does not accurately reflect today's telecommunications markets.⁴ These rules were designed almost exclusively to address proper jurisdictional treatment of voice traffic over a regulated monopoly's network. However, the separations rules have not kept pace with recent significant statutory, technological, and market changes. These changes are causing a variety of anomalies in the application of separations rules, which must be addressed immediately.

The State Members acknowledge,⁵ and the record in CC Docket 80-286 demonstrates, that inability to accurately measure traffic, especially Internet usage, used in determining separations allocations of advanced technologies, is an area of prime concern. As has been explained in previous filings with the Commission, Internet traffic exhibits dramatically different calling patterns and usage characteristics than voice traffic.⁶ To the extent that this traffic is treated as intrastate in cost separations studies, it causes unforeseen consequences in separations results.⁷ While the distorting effect of Internet traffic on separations studies did not reach serious proportions in previous years, increases in Internet usage are expected to produce significant effects on exchange carriers' traffic and separations studies in current and future data years.

The Commission's recent decision with respect to reciprocal compensation⁸ has only added to the need and the justification for an immediate action in this proceeding to

⁴ *Id.* at 1.

⁵ *Id.* at 8.

⁶ See NECA Petition for Waiver of Section 36.2(a)(3) of the Commission's Rules (filed May 8, 1998) (pointing out that Internet traffic differs from voice in that it is predominantly data transmission and has disproportionately long holding times.)

⁷ *Id.*

⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, *Declaratory Ruling in CC*

prevent further distortions by use of separations procedures developed in the “pre-Internet” era. The Commission ruled there that “at least a substantial portion of dial-up ISP [Internet service provider] bound traffic is interstate”⁹ and that “the Commission traditionally has characterized the link from an end user to an ESP [enhanced service provider] as an interstate access service.”¹⁰ However, the Commission went on to reaffirm its policy of exempting this “largely interstate”¹¹ traffic from interstate access charges and to provide that ESPs “continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs.”¹² Finally, although the Commission emphasized that the exemption “does not transform the nature of traffic routed to ESPs . . . [or] affect the Commission’s ability to exercise jurisdiction over such traffic,”¹³ it stated that “for those LECs subject to jurisdictional separations both the costs and the revenues associated with such connections will continue to be accounted for as intrastate.”¹⁴ Despite the Commission’s assertion, the inconsistent separations treatment of dial-ISP bound traffic must ultimately be addressed and reconciled in CC Docket 80-286. The Telephone Associations recognize that an interim freeze is a temporary solution to a problem that cries for a rational solution.

Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38 (rel. Feb. 26, 1999) (Reciprocal Compensation Order).

⁹ *Id.* at ¶ 20.

¹⁰ *Id.* at ¶ 16.

¹¹ *Id.* at ¶ 23.

¹² *Id.* at ¶ 20.

¹³ *Id.* at ¶ 16.

¹⁴ *Id.* at ¶ 36.

The result of the Reciprocal Compensation decision is to continue to accelerate the unwarranted shifts in interstate costs into the intrastate jurisdiction and the resulting distortions in the separations factors, in turn shifting other costs to the intrastate jurisdiction. To resolve this problem, the Commission should consider imposing an interim “freeze” on separations factors, as suggested by several participants in earlier phases of this proceeding.¹⁵ This freeze for non-price cap carriers could be based on data from a representative prior period, such as an average three-year period, or on a single one-year period.¹⁶ Only an expedited freeze of the separations factors can stop the misclassification of Internet traffic from reaching the exact opposite result of what the Supreme Court intended when it required the “appropriate recognition of the competent governmental authority in each field of regulation.”¹⁷ In other words, without an interim freeze to prevent further interstate costs from being left for intrastate recovery, the Commission’s order will increasingly and unlawfully saddle the states with the confiscation liability for recovering interstate costs via intrastate rates. State Members acknowledge that the prohibition against uncompensated “takings” is at the core of the

¹⁵ See, e.g., The Rural Telephone Coalition Comments on *NPRM* at 9-10 (Dec. 10, 1996) (supports an interim freeze for rural ILEC’s jurisdictional factors while the Commission revamps the access charge and universal service rules); and USTA Comments on *NPRM* (Dec. 10, 1996) (USTA’s freeze proposal is suggested to simplify separations procedures, but it could also be successful in solving the problems associated with Internet traffic.) Other parties proposed removal of Internet usage entirely from development of usage based traffic factors, before separating federal and state costs. See, e.g., Dobson Telephone Company and McLoud Telephone Company Comments on *NPRM* at 3 (Dec. 10, 1996). Removal of Internet traffic from separations studies would also be effective in preventing distortions to separations results associated with Internet traffic.

¹⁶ The selection of a specific time period is important. To be effective, the freeze should stop the unjustified cost shifts at a point before they have done serious damage to the reliability of the usage factors and the fundamental validity of jurisdictional separations results.

¹⁷ *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930).

requirement to properly allocate costs between jurisdictions.¹⁸ Additionally, the State Members' rolling average will result in shortfalls that will not be addressed in the interim during which state and federal USF support mechanisms are being developed.

In contrast, a freeze would provide stability and predictability as the Commission and the states deal with other issues that require prompt resolution and coordination, such as universal service and access issues, and the many pending cost recovery issues related to new requirements imposed by Congress and the Commission.¹⁹

Under the State Members' proposed interim solution to anomalies currently affecting separations results,²⁰ ILECs would average the latest three years of separations usage factors on an ongoing basis.²¹ The State Members believe that this proposal will dampen the impact of usage changes and resultant cost shifts from year to year.²²

In the Telephone Associations' view, however, using a three-year rolling average does not adequately address the separations distortions caused by changing technologies and network usage patterns. For example, to the extent that Internet usage is reflected in separations factors as intrastate traffic, increases in this predominately interstate traffic²³

¹⁸ See *Report* at 3. The State Members' three-year rolling average will not alleviate confiscation issues since, as explained above, ISPs obtain services using local business lines, and do not pay charges on related usage. To the extent that these higher levels of costs are allocated to the intrastate jurisdiction, and not reflected in local tariff rates paid by ISPs, they may not be recovered by the carrier, causing a "takings" issue to arise.

¹⁹ For example, the Commission is currently considering cost recovery issues related to CPNI protection and local number portability. See, e.g., Pleading Cycle Established for Comments on Petition for Expedited Interim Waiver of Section 52.33 of the Commission's Number Portability Rules, CC Docket No. 95-116, CCB/CDP No. 99-9, *Public Notice*, DA 99-581 (rel. March 24, 1999).

²⁰ *Report* at 15.

²¹ *Id.*

²² *Id.*

²³ *Reciprocal Compensation Order* at ¶ 20.

will increasingly cause shifts in revenue requirements to the intrastate jurisdiction, distorting separations results. The State Members' proposed three-year rolling average does not solve this problem; it merely spreads the inevitable cost shift over a slightly longer period of time.

Arguably, long-term solutions for this problem may be developed in the context of the Commission's Access Charge and Separations Reform proceedings. The introduction of new technologies, such as xDSL and frame relay services, may also partially facilitate solutions to the jurisdictional cost recovery problems caused by Internet traffic. To the extent that these regulatory and market-based solutions occur over time, however, the three-year average will not be sufficient to avoid distortions in separations results.

The State Members' proposal also conflicts with the Commission's goal of simplifying separations procedures.²⁴ If adopted, this proposal will require carriers to implement additional procedures to determine jurisdictional allocations, procedures that represent unnecessary administrative burdens for the mostly small and rural ILECs who are primarily subject to separations rules.

²⁴ See Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22120 at ¶ 25 (1997)(NPRM).

Conclusion

The Telephone Associations agree with the State Members of the Joint Board that an interim separations mechanism is necessary, pending further study of separations reform. The Commission and Joint Board should therefore consider adopting an interim "freeze" mechanism that will halt separations distortions resulting from changes in technology and network usage patterns. This approach, if adopted, will contribute to the successful achievement of Commission and Joint Board goals in this proceeding, and will reduce regulatory burdens and costs for these carriers consistent with the public interest.

Respectfully submitted,

March 30, 1999

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)
Jurisdictional Separations Reform)
And Referral to the Federal-State)
Joint Board)

RECEIVED
CC Docket No. 80-286
APR 14 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
DA 99-414

REPLY

The National Exchange Carrier Association, Inc. (NECA), National Rural Telecom Association (NRTA), National Telephone Cooperative Association (NTCA), and Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), (collectively referred to as "Telephone Associations") submit this reply to comments filed in response to the Federal Communications Commission's (FCC or Commission) *Public Notice*¹ regarding a December 21, 1998 *Report* by the State Members (State Members) of the Federal State Joint Board (Joint Board) on Separations.²

The Telephone Associations' comments agreed with the State Members that interim measures are needed to deal with distortions in separations results caused by Internet traffic.³ However, the Telephone Associations commented that the Commission should adopt an interim "freeze" mechanism rather than a three-year rolling average of separations usage factors, as proposed by the State Members.

¹ *Report Filed by State Members of Joint Board on Jurisdictional Separations*, CC Docket No. 80-286, *Public Notice*, DA 99-414 (rel. Feb. 26, 1999) (*Public Notice*).

² *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, *State Members' Report on Comprehensive Review of Separations* (fil. Dec. 21, 1998) (*Report*).

³ *See Id.* at 15. *See also* Telephone Associations' Comments at 1 (Mar. 30, 1999).

AT&T argued against such an interim measure because "transition plans tend to remain in place and become the *de facto* rule."⁴ But there is no reason to conclude that the interim mechanisms proposed in this proceeding will necessarily become permanent (although it is possible that some type of fixed-factor approach may eventually be adopted in the Commission's separations reform proceeding).

While MCI generally opposes adoption of an interim relief mechanism, it expresses a preference for the three-year rolling average proposal advanced by the State Members over the freeze mechanism advocated by LECs.⁵ As the Telephone Associations and other commenters pointed out, however, the three-year rolling average mechanism will increase administrative burdens and introduce more complexity into the separations process without necessarily solving the jurisdictional problems associated with dial-up Internet Service Provider (ISP) traffic.⁶ In addition, a three-year rolling average may still have the effect of creating a cost shift toward the local jurisdiction, placing upward pressure on local rates for costs that are associated with interstate telecommunications.⁷

As the Telephone Associations explain in their comments, an interim "freeze" mechanism would alleviate many of the concerns associated with the growth in Internet

⁴ AT&T Comments at 3 (Mar. 30, 1999).

⁵ See MCI Comments at 7 - 8 (Mar. 30, 1999) ("The three-year rolling average proposal offers some advantages over the ILECs' freeze proposals. . . . However, if cost allocations would otherwise trend in the direction of one of the jurisdictions, the only effect of the moving average approach would be to introduce a lag into the separations process. . . .")

⁶ See Comments of Ameritech at 8 - 10, Bell Atlantic at 3 - 4, GTE at 9, GVNW at 9 - 10, NECA at 5, SBC at 8 - 9, Smithville Telephone at 9, TDS at 3 - 4 and 11, and USTA at 2 - 3 and 10 - 11 (Mar. 30, 1999).

⁷ See JSI Comments at 3 (Mar. 30, 1999).

traffic. Unlike the three-year rolling average, such a mechanism will not introduce any new regulatory burdens or additional complexities into the separations process.

Some parties propose that Internet traffic be removed entirely from the development of usage based traffic factors.⁸ Western Alliance states that since Internet traffic will not generate access revenues or additional local service revenues, the usage should be removed from the calculation of allocation factors.⁹ The Telephone Associations agree that this alternate approach would result in more stable and consistent allocation factors, and, therefore, provide an alternative interim solution to problems associated with Internet traffic. Additionally, the exemption of Internet traffic from the jurisdictional allocation factor development would be consistent with the Commission's treatment of enhanced service provider traffic for access charge purposes.¹⁰

Conclusion

The Telephone Associations reiterate that an interim separations mechanism is necessary, pending further study of separations reform. The Commission and Joint Board should therefore consider adopting an interim "freeze" mechanism that will halt separations distortions resulting from changes in technology and network usage patterns. In the alternative, the Commission and Joint Board should adopt an interim ruling that Internet traffic be excluded from the development of usage based traffic allocation factors pending long term resolution of this issue.

⁸ See, for example Western Alliance Comments at 9 (Mar. 30, 1999).

⁹ See Western Alliance Comments at 2 (Mar. 30, 1999).

¹⁰ See JSI Comments at 6 (Mar. 30, 1999).

FEDERAL
COMMUNICATIONS
COMMISSION
Washington, D.C. 20554
APR 19 1999

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Jurisdictional Separations Reform and)	CC Docket No. 80-286
Referral to the Federal-State Joint Board)	

REPLY COMMENTS
OF THE
- UNITED STATES TELEPHONE ASSOCIATION

The United State Telephone Association (USTA) hereby replies to comments filed in response to the Commission's Public Notice¹ in the above-referenced proceeding. Comments were filed on issues raised in the state members' report on comprehensive review of separations filed on December 21, 1998 (the State Report).

I. INTRODUCTION

In addressing the principal issues raised by the State Report, USTA stated in its comments that jurisdictional separations remains necessary as long as local exchange carriers (LECs) are subject to federal and state regulation of rates, in any form. Until a freeze is imposed, costs of new technologies should continue to be allocated through the existing separations process. As new technologies are introduced, cost recovery methods, if needed, can be implemented without the need to alter the separations process.

USTA emphasized once again that separations reform is needed, starting with a

¹Public Notice DA 99-414, released February 26, 1999.

transition from the present burdensome separations process and ultimately resulting in the elimination of jurisdictional separations. The USTA proposal to freeze separations should be adopted by the Commission immediately. The Commission should not adopt the State Report's transitional reform recommendation because the three-year rolling average of separations factors it would require increases the already burdensome requirements of the Commission's Part 36 rules.²

In these reply comments, USTA explains that comments filed on the State Report underscore the importance of adoption of the USTA proposal. In addition, specific suggestions made by AT&T warrant further rebuttal. Particularly, AT&T reiterates earlier proposals that the allocation of loop costs to the interstate jurisdiction be reduced from 25 percent to 15 percent, and that the marketing expenses and customer service expenses recovered from interstate carrier access charges be removed from the interstate jurisdiction. Below we set forth reasons why each of these proposals should be rejected.

II. FREEZING OF SEPARATIONS SHOULD BE ADOPTED AS A TRANSITION PLAN

The USTA proposal on separations reform has received widespread support explicitly or conceptually from other commenters³ and should be adopted by the Commission. In contrast, the State Report's proposal for a three-year rolling average of

²47 C.F.R. Part 36.

³Comments of Ameritech at 10, Bell Atlantic at 3, GTE at 8, GVNW at 7, NECA at 5, SBC at 8, and TDS at 11-12.

separations factors has drawn criticism⁴ and falls far short of achieving true separations reform. USTA first advocated its freeze proposal in its December 10, 1997 comments in this proceeding. It has reiterated that position in its January 26, 1998 reply comments and its March 30, 1999 comments on the State Report, as well as in many *ex parte* filings in this docket. The essential elements of the USTA plan include a freeze of jurisdictional allocation percentages and category relationships immediately for price cap companies and a freeze of jurisdictional apportionment factors based on a three-year average of those factors from 1994 through 1996 for non-price cap companies. This freeze is an interim step toward the elimination of separations, which is a vital element of the USTA proposal.

The USTA proposal is simple, results in minimal jurisdictional cost shifting and, as long as rate regulation continues, maintains a uniform, auditable separations process providing reasonable and stable allocations. The USTA plan satisfies reporting requirements and provides a more cost-effective method for the LECs to perform separations studies than the current rules. It also maintains state and federal jurisdictions pursuant to the holding in *Smith v. Illinois Bell Tel. Co.*⁵ The USTA proposed freeze could not be manipulated.

The time is ripe to initiate planning for the eventual elimination of the current separations process. The USTA plan is the logical and correct means by which to start that

⁴Comments of Ameritech at 8, AT&T at 2-3, Bell Atlantic at 1-2 and 4, GTE at 8, GVNW at 6, JSI at 2-4, MCI Worldcom at 7-8, NECA at 6, SBC at 9, Smithville Telephone Company at 9-10, Sprint at 9-10, TDS at 11-12, US West, USTA at 10-11, and Western Alliance at 9.

⁵282 U.S. 133 (1930).